

STATE OF CALIFORNIA

Public Utilities Commission
San Francisco

M e m o r a n d u m

Date: May 4, 2006

To: The Commission
(Meeting of May 11, 2006)

From: Delaney Hunter, Director
Office of Governmental Affairs (OGA) — Sacramento

Subject: **SJR 24 (Murray)** - Telecommunications: Internet network neutrality
As Introduced February 23, 2006

LEGISLATIVE SUBCOMMITTEE RECOMMENDATION: Support with Technical Amendments

SUMMARY OF BILL:

SJR 24 calls on the President and Congress to would urge Congress and the President to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet based the four principles included in the FCC Policy Statement.

SUMMARY OF SUGGESTED AMENDMENTS (Technical):

Amendment 1

Language should be added that refers to the qualifier that the Internet neutrality principles it supports “are subject to reasonable network management”

Amendment 2

The resolution should be addressed to the members of the Federal Communications Commission as well as the President and Congress.

DIVISION ANALYSIS (OGA):

SJR 24 is largely based upon the four principles included in the FCC Policy Statement. SJR 24 calls for adoption of the following resolution:

That the Legislature of the State of California hereby memorializes Congress and the President of the United States to encourage broadband deployment and preserve and promote the open and interconnected nature of public Internet based on the following four principles:

(1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers. . . .

Each of the four principles listed in SJR 24 is an exact restatement of the principles contained in the FCC Policy Statement.

SJR 24, however, misses a few key details. First, the resolution fails to include the FCC Policy Statement's important limitation on its Internet network neutrality principles, i.e., that the principles are "subject to reasonable network management." This limitation is an important one. The qualification found in the FCC Policy Statement recognizes from experience that a network owner may need to place some limits on use of its network in order to provide a good experience for all of its customers. A network owner may need some flexibility to innovate, maintain a high degree of service quality (especially in a cable system where users share capacity in a neighborhood), and ensure its network is secure. Thus SJR 24 should stipulate that the Internet network neutrality principles it endorses are "subject to reasonable network management."

Also, SJR 24 inappropriately addresses its Internet network neutrality resolution to "Congress and the President of the United States." As recognized by the FCC, the FCC Policy Statement principles currently are best enforced through the agency's ongoing policymaking activities, rather than one-size-fits-all regulation or legislation. The California Legislature, therefore, should not focus its resolution on just "Congress and the President of the United States" – but also the FCC as key federal policymakers.

BACKGROUND:

Last year the Federal Communications Commission issued a policy statement (FCC Policy Statement) adopting four principles for ensuring "that broadband networks are widely deployed, open, affordable, and accessible to all consumers."¹ The four principles included in the FCC Policy Statement are as follows:

- Consumers are entitled to access the lawful Internet content of their choice;

¹ Action by the Commission by Policy Statement (Aug. 5, 2005), FCC 05-151 (FCC Policy Statement).

- Consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;
- Consumers are entitled to connect their choice of legal devices that do not harm the network; and
- Consumers are entitled to competition among network providers, application and service providers, and content providers.²

While declining to adopt any rules, the FCC Policy Statement declares that the agency will incorporate its Internet network neutrality principles into its “ongoing policymaking activities.”³ The FCC Policy Statement further provides (in an important footnote) that these four principles are “subject to reasonable network management.”⁴

The FCC Policy Statement is consistent with an enforcement action the FCC took against Madison River Telephone Company, LLC (Madison River) earlier in 2005. Vonage informed the FCC that Madison River, a telephone company that offered DSL service, had deliberately blocked Vonage customers’ calls. In response the FCC investigated the compliance of Madison River with § 201(b) of the Communications Act.⁵ The FCC subsequently fined Madison River and stopped its “block[ing] ports used for VoIP applications or otherwise prevent[ing] customers from using VoIP applications.”⁶ The Madison River enforcement action demonstrates that the FCC is willing to attack anticompetitive behavior by network providers.

At the state level, the PUC adopted a Policy Statement in Support of the Principle of Consumer Choice in the Voice Communications Market (PUC Policy Statement) last year. The PUC Policy Statement calls for PUC Staff to promote the FCC’s Policy Statement “with all relevant agencies and policymakers at the Federal and State Level.”⁷

² FCC Policy Statement at 3. These principles were similar to four “Internet Freedoms” previously endorsed by former FCC Chairman Michael Powell. Remarks of Michael K. Powell Chairman, Federal Communications Commission at the Silicon Flatirons Symposium on “The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age,” University of Colorado School of Law Boulder, Colorado (Feb. 8, 2004), at 5. Powell’s four freedoms covered the first three principles contained in the FCC Policy Statement. *Id.* Powell’s fourth freedom addressed the freedom to obtain service plan information, i.e., the ability of consumers to receive meaningful information regarding their service plans. *Id.*

³ FCC Policy Statement at n.15; *id.* at 3.

⁴ *Id.* at n.15.

⁵ See 47 U.S.C. § 201(b) (“All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.”).

⁶ Federal Communications Commission, Consent Decree in the Matter of Madison River Communications, LLC and Affiliated Companies, DA 05-543 (Mar. 3, 2005), at 2.

⁷ California Public Utilities Commission, Policy Statement that the CPUC Supports the Principle of Consumer Choice in the Voice Communications Market (Aug. 25, 2005), at 3. It also resolved that “nothing in th[e] resolution is intended to advocate prohibiting the bundling of services over high-speed Internet facilities or requiring the low frequency portion of the loop to be unbundled or offered as a network element.” *Id.* at 4.

LEGISLATIVE HISTORY:

None

FISCAL IMPACT:

None

STATUS:

SJR 24 is pending a hearing in the Senate Energy, Utilities and Communications Committee.

SUPPORT/OPPOSITION:

Support

California Association of Competitive Telecommunications Companies (CALTEL) (sponsor)
California Internet Service Provider Association (CISPA) (sponsor)
InterActive Corporation

Opposition

None on file.

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BILL LANGUAGE:

BILL NUMBER: SJR 24 INTRODUCED
BILL TEXT

INTRODUCED BY Senator Murray

FEBRUARY 23, 2006

Relative to the Internet.

LEGISLATIVE COUNSEL'S DIGEST

SJR 24, as introduced, Murray Telecommunications: Internet network neutrality.

This measure would urge Congress and the President to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet based on the 4 principles stated in the measure.

Fiscal committee: no.

WHEREAS, Two-thirds of the households in the United States now have some form of Internet service at home, and the majority of those households have migrated from narrowband, dial-up service to broadband, "always-on" service; and

WHEREAS, The Internet has taken on a critical role in daily life for personal communications, access to news and information, online banking, e-commerce, and retrieving government information; and

WHEREAS, The principle of nondiscrimination in access to communications networks has been part of public policy for the telecommunications industry for a century and as more of our economic and social life goes online, access to communications takes on even greater importance; and

WHEREAS, Recent decisions by the Federal Communications Commission have eliminated the requirement for broadband network owners to allow Internet service providers to use their high speed broadband networks in order to offer competitive broadband service; and

WHEREAS, Those decisions have also given network owners the power to discriminate against content or services that their subscribers access via the Internet, such as Internet telephone service, video streaming and other applications, and even content that may compete with the owner's own offerings; and

WHEREAS, Congress is currently debating the merits of legislation to ensure principles of "network neutrality," to require operation of the network in a manner that does not impede, block or slow the flow of content, services or applications or impair the functioning of devices connected to the network; and

WHEREAS, The outcome of this legislative process will largely determine the future of the Internet for consumers; now, therefore, be it

Resolved by the Senate and the Assembly of the State of California, jointly, That the Legislature of the State of California hereby memorializes Congress and the President of the United States to encourage broadband deployment and preserve and promote the open and interconnected nature of public Internet based on the following four principles: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network, and (4) consumers are entitled to competition among network providers, application and service providers, and content providers; and be it further

Resolved, That the Secretary of the Senate transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, to the Majority Leader of the Senate, and to each Senator and Representative from California in the Congress of the United States.